



Signed and Filed: October 14, 2009

A handwritten signature in dark ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No. 08-30904 TEC
)	
NGA TUY PHAM,)	Chapter 7
)	
)	
Debtor.)	
_____)	
NGOC LAN THI NGUYEN,)	Adv. Proc. No. 08-3073 TC
)	
Plaintiff,)	
)	
vs.)	
)	
NGA TUY PHAM, YEN CHUNG, KENNY HUNG)	
WAI NG, and QUAN THANH CHUNG,)	
)	
Defendants.)	
_____)	

MEMORANDUM DECISION RE PHASE II OF TRIAL

The court held phase II of the trial in this action on August 25 and 26, 2009. Robin E. Foor appeared for Plaintiff. Roberto Ripamonti appeared for Defendant.

Plaintiff contends that Defendant owes her \$316,747.¹ Plaintiff seeks to have this court liquidate the amount due

¹ \$264,253 plus prejudgment interest of \$52,494.

1 Plaintiff, to have this court deny Defendant a discharge under
2 section 727 of the Bankruptcy Code, and if Defendant is not denied
3 a discharge, to have this court determine that Defendant's debt to
4 Plaintiff is excepted from discharge under section 523(a) of the
5 Bankruptcy Code. Upon due consideration, and for the reasons
6 stated below, which shall constitute the court's findings of fact
7 and conclusions of law, I determine that Defendant's debt to
8 Plaintiff should not be excepted from discharge, and that Defendant
9 should not be denied a discharge of her debts. Because there is no
10 clear record of the amount due, and because it is unnecessary given
11 the court's ruling re discharge and dischargeability, the court
12 does not attempt to fix the amount due Plaintiff.²

13 **EXCEPTION FROM DISCHARGE**

14 A. Fraud in the Inducement

15 A debt is excepted from discharge if it results from fraud in
16 the inducement. 11 U.S.C. § 523(a)(2). Where, as here, the debtor
17 has not employed a false financial statement, the creditor must
18 prove the following elements: (1) the debtor obtained money or
19 property from the creditor; (2) the debtor made a misrepresentation
20 of fact; (3) the debtor made such misrepresentation knowingly and
21 with the intent to deceive the creditor; (4) the creditor
22 justifiably relied upon debtor's representation; and (5) the
23 creditor suffered damages as a result. Am. Express Travel Related
24 Svcs. Co., Inc. v. Hashimi (In re Hashimi), 104 F.3d 1122, 1125
25 (9th Cir. 1997).

26
27 ² Nor does the court address Plaintiff's estoppel argument
28 because the court assumes, without deciding, that Plaintiff's
claims are not time barred.

1 Plaintiff alleges that Defendant obtained money from Plaintiff
2 by making various misrepresentations of fact, that the unpaid
3 amount of the loans made in reliance on those misrepresentations is
4 \$316,747 (including prejudgment interest), and that Defendant's
5 debt to Plaintiff should be excepted from discharge under section
6 523(a)(2)(A) as constituting fraud in the inducement. The court
7 will address each of the asserted misrepresentations.

8 1. Loan obtained without intent to repay. Plaintiff first
9 contends that the loans should be excepted from discharge because
10 Defendant explicitly or implicitly promised to repay the loans, but
11 never intended to do so.

12 The loans from Plaintiff to Defendant were very informal.
13 There is only one promissory note in the amount of \$25,000. The
14 remainder of the alleged loans consist of numerous checks, some
15 payable to Defendant, some payable to Defendant's family business,
16 some payable to Defendant's husband, some payable to Defendant's
17 daughter. Defendant contends that the amount Plaintiff loaned
18 Defendant is much less than the \$264,253 claimed by Plaintiff.
19 Defendant testified that many of the checks written by Plaintiff
20 did not represent loans to Defendant, but instead were given to
21 Defendant in exchange for cash from Defendant's family laundry
22 business: i.e. that Defendant cashed checks for Plaintiff. This
23 testimony was corroborated by the testimony of Defendant's son.

24 I credit Defendant's testimony that many of the checks did not
25 represent loans to Defendant, but were merely cashed by Defendant,
26 and that the loan balance outstanding is substantially less than
27 claimed by Plaintiff. In so finding, I rely in part on the fact
28 that Defendant and her husband reported a substantial majority of

1 the funds received from Plaintiff as income. Loan proceeds are not
2 income. I note that the vast majority of checks from Plaintiff
3 were deposited in the bank accounts maintained by Defendant, her
4 husband, and the family business. I also note that in only one
5 year do bank deposits substantially exceed the business gross
6 receipts reported on the tax returns filed by Defendant and her
7 husband.³ There is no reason to believe that Defendant would
8 include in income checks from Plaintiff if those checks did not
9 represent the cash receipts of the family business rather than
10 loans from Plaintiff.⁴

11 There clearly were some loans from Plaintiff to Defendant. In
12 January 2003, Defendant signed a promissory note in the amount of
13 \$25,000. In her bankruptcy schedules, Defendant listed a debt to
14 Plaintiff in the amount of \$41,891. While I cannot determine the
15 exact amount due, it is more likely than not that the balance
16 actually due is substantially less than the \$316,747 (including
17 prejudgment interest) claimed by Plaintiff.

18 It is against this backdrop that the court must determine
19 whether Defendant obtained the loans without intent to repay.
20 Plaintiff, of course, has no direct evidence that Defendant never
21 intended to repay; such intent must be inferred from the
22

23 ³ Defendant and her husband had no source of significant
24 income other than the family business.

25 ⁴ Only in 2003, the year Defendant signed the sole promissory
26 note offered to document any loan from Plaintiff, did the deposits
27 in the bank accounts of Defendant, her husband, and the family
28 together substantially exceed (by \$70,549) the gross receipts
reported on Schedule C of Defendant's tax return. In 2004, bank
deposits exceeded gross receipts by less than \$15,000, and in 2002,
2005, 2006, and 2007, bank deposits were less than the reported
gross receipts.

1 circumstances. Plaintiff acknowledges that Defendant repaid
2 Plaintiff more than \$41,000 over a four-year period. Defendant
3 testified that she ceased making payments only when a dispute arose
4 over the amount due. In light of the history of payments made, I
5 find that Defendant did not obtain any loan from Plaintiff without
6 intending to repay, and therefore conclude that the loans may not
7 be excepted from discharge on that theory.

8 2. Posing as deceased brother's spirit. Plaintiff next
9 asserts that Defendant fraudulently induced Plaintiff to make loans
10 to her by calling Plaintiff on the telephone, impersonating the
11 spirit of Plaintiff's deceased brother, and in that guise urging
12 Plaintiff to make loans to Defendant at low interest and without
13 documentation. Plaintiff contends that she was justified in
14 relying upon these representations because Defendant was
15 Plaintiff's close friend, because Plaintiff is a Buddhist who
16 believes in spirits, and because Plaintiff is unusually gullible.

17 Justifiable reliance is largely a subjective test in which the
18 sophistication of the plaintiff is taken into account. Field v.
19 Mans, 116 S.Ct. 437 (1995). Plaintiff testified that she is a
20 Buddhist for whom the spirits of dead relatives are very real and
21 important, and that she has been defrauded many times and is
22 unusually gullible. Defendant denies impersonating Plaintiff's
23 brother.

24 I have serious doubts whether Defendant impersonated
25 Plaintiff's deceased brother, but find that even if she did,
26 Plaintiff's reliance on such a representation was not justifiable.

27 First, Plaintiff is not wholly unsophisticated (she attended
28 college for two years in Vietnam).

1 Second, Defendant made no misrepresentation of material fact.
2 A fact is material if it concerns information of the type that a
3 reasonable person would rely upon in making a loan. The statement
4 of the spirit of a deceased relative is not that type of
5 information.

6 Third, what qualifies as justifiable reliance is not *entirely*
7 subjective. Reliance is not justifiable when ordinary use of the
8 senses contradicts the representation relied upon. Thus, the
9 Supreme Court stated in Field v. Mans:

10 Justifiability is not without some limits, however. As a
11 comment to § 541 [of the Restatement (Second) of Torts (1976)]
12 explains, a person is "required to use his senses, and cannot
13 recover if he blindly relies upon a misrepresentation the
14 falsity of which would be patent to him if he had utilized his
15 opportunity to make a cursory examination or investigation.
16 Thus, if one induces another to buy a horse by representing it
17 to be sound, the purchaser cannot recover even though the
18 horse has but one eye, if the horse is shown to the purchaser
19 before he buys it and the slightest inspection would have
20 disclosed the defect."

21 Id. 116 S.Ct. at 444. Ordinary use of the senses would have
22 revealed to Plaintiff that her deceased brother was not talking to
23 her.

24 Fourth, Plaintiff's relationship with Defendant does not
25 eliminate the problems with her reliance upon the impersonation of
26 a dead person. Friendship might entitle Plaintiff to rely upon
27 certain representations by Defendant without the same inquiry that
28 would be required if she were dealing with a stranger. For
instance, Plaintiff might have been justified in relying upon
Defendant's representation that the family business had a very good
year and that Defendant had the resources to take on larger loans.
Plaintiff's friendship with Defendant does not make it any more

1 justifiable for Plaintiff to make a business decision on the basis
2 of Defendant's impersonation of Plaintiff's deceased brother.

3 Plaintiff's counsel urges that Plaintiff must be entitled to
4 rely upon her religious belief in spirits as a matter of freedom of
5 religion. This argument is unpersuasive. Plaintiff may worship
6 and believe as she chooses. Plaintiff is also free to make
7 business decisions on the basis of the advice of spirits.

8 Plaintiff has cited no authority holding that she can rely on
9 religious belief to prove that such a method of decision making is
10 justifiable for the purpose of a civil fraud suit. To hear audibly
11 the voice of a dead relative is a supernatural event. That it can
12 happen is a matter of religious belief, not a matter of fact.

13 Plaintiff seeks to use her religious belief to show that reliance
14 on the voice of her deceased brother is justifiable, and then
15 shifts to the realm of fact to show that Defendant pretended to be,
16 but was not, the spirit of her deceased brother. Plaintiff has
17 cited no authority that a party can mix the realms of fact and
18 religious belief in the way she seeks to do.

19 3. Fish sauce investment. Plaintiff next contends that, in
20 February 2002, Defendant induced her to invest \$9,000 in a fish
21 sauce business that Defendant was to start in Vietnam, and that
22 Defendant instead kept the money for her own use. Plaintiff
23 testified that Defendant told Plaintiff that Defendant's uncle
24 owned the leading fish sauce company, that Defendant had personally
25 developed the formula for that product, and that Defendant would
26 use this knowledge to start a business competing with her uncle's
27 business. Plaintiff testified that Defendant never started the
28 business and never repaid Defendant.

1 Defendant testified that she did not obtain any funds from
2 Plaintiff for investment in a fish sauce business.

3 I find that Defendant did not obtain any money from Plaintiff
4 by representing that it would be invested in a fish sauce business.
5 First, it is doubtful that Defendant transferred \$9,000 to
6 Defendant at the time in question. The only written evidence of
7 such a transfer is Plaintiff's withdrawal of \$7,500 in cash from
8 her savings account on February 15, 2002, and her handwritten note
9 that she transferred \$9,000 to Defendant. There is no evidence of
10 a deposit in that amount on or about February 15, 2002 in any of
11 the bank accounts of Defendant or her husband. Second, there is no
12 documentation of any investment in a business to be formed.
13 Plaintiff does not even state what share she was to receive for her
14 investment. Third, Plaintiff did not complain about not receiving
15 her share of the business until after Defendant filed her
16 bankruptcy petition more than six years after the alleged transfer
17 to Defendant. I find that if Plaintiff did advance the \$9,000 in
18 question, it was a loan to Defendant, and that loan was not made
19 upon the representation that the proceeds would be used to start a
20 fish sauce business.

21 4. Vietnam land purchase. Plaintiff testified that she
22 advanced \$76,835 to Defendant in April 2005 upon Defendant's
23 representation that Defendant would forward those funds to
24 Defendant's sister in Vietnam, that the sister would purchase land
25 in Vietnam for Plaintiff, and that the sister would manage that
26 land for Plaintiff. Plaintiff testified that she never received
27 land in Vietnam and that Defendant defrauded Plaintiff of the
28 \$76,835 by diverting that money to Defendant's own use.

1 Defendant testified that she never received money from
2 Plaintiff for the purchase of land in Vietnam, and that none of her
3 sisters were living in Vietnam in 2005. Defendant acknowledged
4 that she received a much smaller sum from Plaintiff for transfer to
5 Vietnam, but that those funds were intended to be given to, and
6 were in fact given to, a Vietnamese charity. Defendant also
7 acknowledged receipt of other funds from Plaintiff in April 2005,
8 but testified that those funds were loans from Plaintiff, repayment
9 of prior loans to Plaintiff, or cashing of checks for Plaintiff.

10 I find that Plaintiff did not transfer funds to Defendant for
11 the purpose of acquiring land in Vietnam, and that Defendant did
12 not commit fraud with respect to the funds transferred to her in
13 April 2005. In so finding, I note that there was no meaningful
14 documentation of any transfer of funds for the purchase of land,
15 and that Plaintiff would have insisted upon such documentation
16 because she had been defrauded in the purchase of land in a
17 previous transaction with another party. Plaintiff made loans to
18 Defendant, but the evidence does not indicate that the loans were
19 made upon the representation that the funds would be invested for
20 Plaintiff in land in Vietnam.

21 5. Altered check. On April 12, 2005, Plaintiff wrote a check
22 to Defendant that is internally inconsistent regarding the amount
23 payable. In words, the check states the amount payable to be "two
24 thousand dollars." In numerals, the check states the amount
25 payable to be "\$20,000." Plaintiff testified that in writing the
26 check, she wrote the numerals "\$2,000," and that Defendant altered
27 the check by adding an extra zero. Plaintiff also asserts that
28 Defendant submitted the check with a deposit slip showing the

1 amount payable as \$20,000, knowing that Plaintiff intended to pay
2 her only \$2,000.

3 Plaintiff did not introduce any expert testimony as to whether
4 the check had been altered. Plaintiff did not introduce evidence
5 that she complained either to Defendant or to her bank about the
6 amount transferred via the check in the three years between her
7 bank's payment of \$20,000 and the filing of Defendant's bankruptcy
8 petition.

9 Defendant testified that she did not alter the check or notice
10 the inconsistency in the check. Defendant, who testified at trial
11 through an interpreter, stated that she does not read English, and
12 that she relied solely upon the numerals when filling out the
13 deposit slip at the time she deposited the check.

14 I find that Defendant did not alter the check, and did not
15 deposit the check knowing that Plaintiff had made a mistake in
16 stating the amount to be paid.

17 B. Other Theories re Exception to Discharge

18 Plaintiff's counsel urges in his trial brief that Plaintiff
19 and Defendant had such a close relationship that Defendant had a
20 fiduciary duty to Plaintiff, that the acts described above
21 constitute fraud by a fiduciary, and that Defendant's debt to
22 Plaintiff should therefore be excepted from discharge pursuant to
23 section 523(a)(4) of the Bankruptcy Code. This argument is
24 unpersuasive, because case law makes clear that section 523(a)(4)
25 applies only where an express trust was imposed before, and without
26 reference to, the wrongdoing that caused the debt. Ragsdale v.
27 Haller, 780 F.2d 794, 795-96 (9th Cir. 1986). Plaintiff introduced
28 no evidence of an express trust.

1 Plaintiff's counsel also urges that the Defendant's debt to
2 Plaintiff should be excepted from discharge under section 523(a)(6)
3 on the basis that Defendant's conduct constituted willful and
4 malicious injury. This argument is also unpersuasive. To prove
5 willful and malicious injury, Plaintiff must show that Defendant
6 intentionally performed an act with the subjective knowledge that
7 such act was substantially certain to cause harm to Plaintiff.
8 Carrillo v. Su (In re Su), 290 F.3d 1140, 1144-45 (9th Cir. 2002).
9 On the basis of the evidence introduced at trial, I find that
10 Defendant performed no acts with such intent and knowledge.

11 **DENIAL OF DISCHARGE**

12 A. False Oath

13 Section 727(a)(4)(A) provides that a court shall deny a debtor
14 a discharge if "the debtor knowingly and fraudulently," in or in
15 connection with a bankruptcy case "made a false oath or account."
16 To deny discharge under this provision, the plaintiff must show
17 that "(1) the debtor knowingly and fraudulently made a false oath;
18 and (2) the false oath related to a material fact." Fogal Legware
19 of Switzerland, Inc. v. Wills (In re Wills), 243 B.R. 58, 62 (9th
20 Cir. BAP 1999). Plaintiff asserts that Defendant made several
21 false statements in connection with her chapter 7 case.

22 1. Jewelry. Plaintiff notes that the only jewelry Debtor
23 disclosed in her bankruptcy schedules was a ring and watch valued
24 together at \$500. Plaintiff contends that Defendant in fact owned
25 additional jewelry and deliberately failed to schedule that
26 additional jewelry.

27 Plaintiff offered no direct evidence that Defendant had
28 jewelry on the petition date that she failed to disclose. Instead,

1 Plaintiff introduced the following checks to show that Defendant
2 had purchased jewelry of substantial value pre-petition.

	<u>Date</u>	<u>Payee</u>	<u>Amount</u>	<u>Deposited by / in</u>
3	1. December 12, 2002	Cash	\$1,369	an Antwerp bank
4	2. April 4, 2003	Cash	\$1,000	Vincent Ma Gems
5	3. August 4, 2003	(illegible)	\$1,194	an Antwerp bank
6	4. February 20, 2004	Tang Huynh	\$2,000	T. Huynh, a jeweler
7	5. March 25, 2004	Cash	\$1,086	Quoc Long Jewelry
8	6. August 2, 2004	Anvir Diamonds	\$1,076	Anvir Diamonds

9 Plaintiff also testified that in December 2004, she accompanied
10 Defendant to a pawn shop, where Defendant paid to recover numerous
11 items of jewelry. On cross-examination, Plaintiff acknowledged
12 that she rarely if ever saw Defendant wearing jewelry, stating that
13 Plaintiff was not the kind of person who wore jewelry.

14 Defendant testified that on the petition date she did not own
15 any jewelry other than the watch and ring she disclosed. She
16 testified that checks 1-3 and 5-6, noted above, were used to
17 purchase jewelry for friends and relatives visiting from out of
18 town, and that in substance she cashed those checks for her
19 visitors. Defendant testified that check 4 was used to purchase
20 jewelry for her daughter and grandchildren, which testimony was
21 corroborated by the testimony of her daughter. Defendant
22 acknowledged that she went to a pawn shop in December 2004, but
23 testified that she did so to surrender jewelry and borrow against
24 it, not to recover jewelry previously pledged.

25 On the evidence submitted at trial, I cannot say that it is
26 more likely than not that Plaintiff failed to disclose jewelry in
27 her bankruptcy schedules. In so finding, I note that: (a) even
28 according to Plaintiff, Defendant had been forced to pawn jewelry
at a date after Defendant's participation in all of the purchases
noted above; (b) Plaintiff herself testified that she has rarely,

1 if ever, seen Defendant wearing jewelry; (c) Defendant's tax
2 returns show that her family never enjoyed a large income from
3 which to buy jewelry; and (d) no one testified to seeing Defendant
4 post-petition in possession of any jewelry other than the ring and
5 watch disclosed.

6 2. Community property interest in laundry. Plaintiff
7 contends that Defendant falsely stated in her schedules that the
8 Yen Laundromat and Cleaners was her husband's property rather than
9 community property. While it is very likely that the business is
10 community property, I find no credible evidence that Defendant
11 misstated its character intentionally and with intent to defraud.
12 Defendant is not sophisticated or well educated and is not well-
13 versed in the concept of community property. More important, the
14 property was listed in the schedules and the trustee would have
15 investigated whether the property was community or separate
16 property if that question ever became important. Defendant gained
17 no advantage by listing it as community property. There being no
18 direct evidence of intentional misstatement and intent to defraud,
19 and Defendant gaining no advantage as result of the statement, the
20 circumstances do not justify an inference that Defendant misstated
21 the character of the property intentionally and with intent to
22 defraud.

23 3. Authority to sign checks. Plaintiff next contends that
24 Debtor falsely testified that only her husband was authorized to
25 write checks on the Yen Laundromat checking account at Gateway
26 Bank. I find that Debtor is not guilty of a false statement within
27 the meaning of section 727 for two reasons. First, Plaintiff did
28 not show that the statement was false. Plaintiff did not introduce

1 the signature card for the account; she showed only that Debtor
2 signed a few checks. Second, and more important, neither the
3 circumstances nor any direct evidence suggests that any
4 misstatement by Debtor was made intentionally and with intent to
5 defraud.

6 4. Laundry income. Plaintiff next contends that Debtor
7 understated the monthly income of the laundry business. In her
8 Schedule I, Debtor lists the monthly income of the business as
9 \$794. Debtor's tax return for 2007 shows \$6,145 annual net income
10 from the laundry business, which works out to monthly net income of
11 \$512, less than the amount shown in Debtor's bankruptcy schedules.⁵
12 The only evidence Plaintiff introduced to show that the laundry
13 income was understated was a reconstruction of expected income
14 based on an IRS formula and using per-load prices charged by other
15 laundries at a time more than a year after Debtor filed her
16 petition. I find that Debtor did not knowingly and fraudulently
17 misstate the income of the laundry business.

18 5. Amount of Nguyen claim. Plaintiff contends that Defendant
19 falsely stated in her schedules that the amount Defendant owed
20 Plaintiff was only \$42,800, rather than the \$316,747 Plaintiff
21 claims. I find that Defendant in good faith believed that she
22 correctly stated the amount owed. As noted above, Defendant
23 testified that many of the checks from Plaintiff were not loans,
24 but were given in exchange for cash from the laundry, and as noted

26 ⁵ Debtor's tax returns for 2002-2007 show \$9,360 average
27 annual income from the laundry, which works out to monthly income
28 of \$780. The laundry income shown in Debtor's tax returns declined
every year, from a high of \$12,976 in 2002, to less than half that
in 2007.

1 above, I credit that testimony. Thus, the debt was less than the
2 amount claimed by Plaintiff. The loans were very informal and
3 hardly documented at all. Plaintiff did not keep a loan ledger and
4 did not provide Defendant with statements of the balance due. To
5 the extent that Defendant did misstate the amount due, I find that
6 she did not make that misstatement intentionally and with the
7 intent to defraud.

8 6. Opening of jewelry store. Plaintiff asserts that
9 Defendant testified falsely at Phase I of the trial. Defendant
10 testified at Phase I that she selected and paid for certain jewelry
11 at the February 2004 grand opening of a jewelry store operated by
12 Tran Huynh. At Phase II of the trial, Plaintiff introduced
13 evidence that the grand opening of Mr. Huynh's store did not occur
14 until May 2004. Plaintiff asserts that Defendant deliberately lied
15 in her testimony.

16 Assuming arguendo that the misstatement was material, I find
17 that Defendant did not make the misstatement intentionally and with
18 intent to defraud. The question at Phase I to which the purchase
19 of jewelry from Mr. Huynh was relevant was whether Defendant's
20 daughter exercised dominion and control over the proceeds of a
21 January 20, 2004 cashier's check in the amount of \$8,500 that was
22 made payable to Defendant's daughter, but requested by and
23 delivered to Defendant. Defendant and Defendant's daughter both
24 testified that Defendant directed the use of all the proceeds of
25 that check, including the \$2,000 paid Mr. Huynh for jewelry. Mr.
26 Huynh's testimony supported the testimony of Defendant and her
27 daughter regarding this crucial point - he testified that it was
28 Defendant who gave him a \$2,000 check and that he had no dealings

1 with the daughter. Mr. Huynh also testified that he did show
2 jewelry to friends and acquaintances before the grand opening, and
3 that it was at such a showing that Defendant selected a bracelet
4 and several chains. I note that all the witnesses were testifying
5 about events that occurred more than five years before and that
6 were not matters of great import when they did occur. On the basis
7 of the evidence introduced at Phase I and Phase II, I find that any
8 misstatement by Defendant regarding the date of the grand opening
9 and the circumstances in which Defendant paid Mr. Huynh was the
10 product of failure to recollect correctly and was not made
11 knowingly and with intent to defraud.

12 B. Failure to Explain Loss of Assets

13 Plaintiff urges finally that Defendant should be denied
14 discharge pursuant to section 727(a)(5), because Defendant has
15 failed to account for the dissipation of the \$264,253 that
16 Plaintiff contends Defendant borrowed and has not repaid.

17 To prevail under section 727(a)(5), Plaintiff must show that
18 some specific asset is missing. The burden then shifts to
19 Defendant to provide an explanation regarding the loss of that
20 asset. Leimbach v. Lane (In re Lane), 302 B.R. 75, 82 (Bankr. D.
21 Idaho 2003).

22 Plaintiff has not shown that Defendant borrowed the full
23 \$264,253 claimed by Plaintiff. As explained above, I find that a
24 substantial dollar amount of the checks delivered to Defendant were
25 not loans from Plaintiff, but were in exchange for cash receipts of
26 the Yen Laundromat and Cleaners. Thus, the loan proceeds whose
27 loss must be explained is substantially less than the amount
28 assumed by Plaintiff.

1 Defendant's records offer a credible explanation of the non-
2 fraudulent disposition of the loan proceeds - that they were simply
3 spent by this low-income family over the six years of the lending
4 relationship. As noted above, the bank records of Defendant and
5 her husband indicate that the vast majority of the checks from
6 Plaintiff went into the bank accounts of Defendant and her husband.
7 There are no unexplained transfers of large sums out of those
8 accounts. The amount loaned was substantially less than the
9 \$264,253 claimed by Plaintiff. The tax returns filed by Defendant
10 and her husband show an average annual adjusted gross income of
11 \$17,720 for calendar years 2002-2007. Furthermore, Defendant's
12 family income declined from \$19,862 in 2005 to \$9,539 in 2007, so
13 that Defendant would have found it more and more compelling to use
14 loan proceeds for ordinary living expenses, and harder and harder
15 to repay the loan. In light of all the evidence, it is more likely
16 than not that Defendant and her family gradually spent the loan
17 proceeds on normal living expenses. I find that Defendant has
18 adequately explained why she no longer had the loan proceeds at the
19 time she filed her chapter 7 case.

20 **CONCLUSION**

21 Defendant should not be denied a discharge, and none of the
22 debt owed Plaintiff should be excepted from discharge.

23 ****END OF MEMORANDUM DECISION****

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MEMORANDUM DECISION RE
PHASE II OF TRIAL

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